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In The
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MASTERPIECE CAKESHOP, LTD., et al.,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, et al.,

Respondents.

On Writ Of Certiorari To The Colorado Court Of Appeals

BRIEF OF COUNTY OF SANTA CLARA, CITIES OF NEW YORK AND LOS ANGELES, 67 ADDITIONAL CITIES AND COUNTIES, 80 MAYORS, AND UNITED STATES CONFERENCE OF MAYORS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

IDENTITY AND INTEREST OF AMICI CURIAE ... 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. AMICI HAVE A CRITICAL INTEREST IN THE ENFORCEMENT OF NON-DISCRIMINATION LAWS 4

A. Discrimination Against LGBTQ People Imposes Significant Harms 6

B. To Further Their Interest in Protecting Against Discrimination, Cities and Counties Across the Country Have Enacted a Range of Local Laws and Policies to Ensure Equal Treatment of LGBTQ People 12

II. RECOGNIZING AN EXEMPTION FROM NON-DISCRIMINATION LAWS ON SPEECH OR RELIGION GROUNDS WOULD HARM AMICI AND THEIR COMMUNITIES 17

A. The First Amendment Does Not Entitle Petitioners to an Exemption From Generally Applicable Non-Discrimination Laws 17

B. Petitioners' Proposed Exemption Would Undermine Local Governments' Ability to Protect Their Residents From Discrimination and Other Harms 21

TABLE OF CONTENTS – Continued

Page

1. The Proposed Exemption Would Undermine Effective Enforcement of Non-Discrimination Protections 22

2. The Proposed Exemption Threatens the Fabric of Amici's Inclusive Communities 25

CONCLUSION 28

APPENDIX

List of Amici ..... App. 1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 5

Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) 19

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) 5

Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990) ..... *passim*

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 6, 26

Hishon v. King & Spalding, 467 U.S. 69 (1984) 17

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557 (1995) 18, 19

Obergefell v. Hodges, 135 S. Ct. 2584 (2015) 5, 6

Reynolds v. United States, 98 U.S. 145 (1878) 20

Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) 4, 5, 18, 27

Romer v. Evans, 517 U.S. 620 (1996) 27

Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47 (2006) 18, 19

United States v. Lee, 455 U.S. 252 (1982) 18

United States v. O'Brien, 391 U.S. 367 (1968) 22

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1 (D.C. 1987).....5

In re Gifford v. McCarthy, 137 A.D.3d 30 (N.Y. App. Div. 2016).....5

Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994).....24

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FEDERAL RULES

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STATUTES AND CODES

2002 N.Y. Laws, ch. 2, A1971.....14

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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Houston, Tex., Code of Ordinances § 2-452 (2017) 15

Houston, Tex., Code of Ordinances § 2-454 (2017) 15

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Knoxville, Tenn., Code of Ordinances § 15-57 (2017) 16

L.A., Cal., Administrative Code § 4.400 (2017) 13

L.A., Cal., Administrative Code § 4.404.1 (2017) 13

L.A., Cal., Administrative Code § 4.404.2 (2017) 13

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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Page

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Page

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TABLE OF AUTHORITIES – Continued

Page

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Page

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici Curiae are 70 cities, towns, and counties, as well as 80 mayors from jurisdictions throughout the United States.[2] Amici represent the level of government most closely connected to our Nation's communities, providing a variety of essential programs and services to enable the members of our communities to live healthy and stable lives. Toward the same end, Amici have enacted a wide range of local laws and policies prohibiting discrimination on the basis of various characteristics, such as race, religion, sex, sexual orientation, and gender identity. Those protections reflect Amici's experience with the significant harms that result when individuals are denied equal treatment because of these characteristics.

Amici have a substantial interest in the question of whether the Free Speech or Free Exercise Clause of the First Amendment requires an exemption from non-discrimination laws. Local non-discrimination

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[1] Pursuant to Rule 37.3(a), written consents to the filing of amicus briefs from Respondent Colorado Civil Rights Commission and Petitioners are on file with the Clerk of the Court. Amici Curiae provided timely notice to Respondents Charlie Craig and David Mullins, whose consent to the filing of this brief is on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than Amici or their counsel made any monetary contribution to the preparation or submission of this brief.

[2] Amici also include the U.S. Conference of Mayors, a non-profit, non-partisan organization of cities with a population of 30,000 or more. A full list of Amici is listed in the Appendix.

protections embody our commitment to pluralism and tolerance in the public sphere, helping to ensure that members of our communities are able to live and work together despite differences in how they look, what they believe, or whom they love. The cohesiveness and inclusiveness of our communities depend on our ability to insist that everyone – whatever their beliefs and values and however they conduct their private affairs – treat one another equally and with respect in employment, housing, public accommodations, and other areas of public life.

SUMMARY OF ARGUMENT

The Colorado Anti-Discrimination Act – like many neutral, generally applicable non-discrimination laws – requires public accommodations to serve members of the public without regard to such factors as race, creed, sex, marital status, or sexual orientation. Colo. Rev. Stat. § 24-34-601(2)(a) (2016). The First Amendment does not mandate an exemption from this uniform requirement for businesses – as Petitioners Masterpiece Cakeshop and its owner Jack Phillips claim in refusing to sell a wedding cake to any same-sex couple. Amici value the diversity of religious beliefs in our communities and throughout the Nation, and indeed many of our non-discrimination statutes expressly prohibit discrimination on the basis of religion. Our respect for the diversity of beliefs is part and parcel of our commitment to ensuring equal access to public accommodations for all people. Individuals may not be excluded

from public accommodations because of what they believe, and their beliefs do not sanction them to engage in discrimination when they provide a public accommodation to others.

Maintaining the inclusiveness of our communities requires that public accommodations be open to everyone. Amici thus have a critically important interest in the effective enforcement of state and local non-discrimination laws, including laws prohibiting discrimination against lesbian, gay, bisexual, transgender, or queer ("LGBTQ") people within our jurisdictions. Discrimination against LGBTQ people – whether the loss of a job, eviction from a home, or rejection by a business – demeans them as individuals and affects our communities as a whole, fostering an environment of exclusion where not all are entitled to respect. Cities and counties have responded by enacting a wide range of local laws and policies to ensure equal treatment of LGBTQ people in a variety of contexts.

Recognizing a First Amendment right to engage in status-based discrimination would undermine the ability of Amici and other localities to ensure equal treatment for LGBTQ people and other members of our communities. The exemption that Petitioners seek from a non-discrimination law contains no readily administrable limiting principle, and could enable an unknown and unbounded number of individuals and businesses to obtain similar constitutional authorization to engage in status-based discrimination against their LGBTQ customers and members of other protected groups. A regime of constitutionalized exemptions from

non-discrimination protections would enshrine into our laws second-class status for LGBTQ people, and undercut Amici's ability to ensure equal treatment of all people.

ARGUMENT

I. AMICI HAVE A CRITICAL INTEREST IN THE ENFORCEMENT OF NON-DISCRIMINATION LAWS.

As local governments and elected officials, Amici have a critically important interest in ensuring that all people within our jurisdictions are treated fairly and equally under the law, have an equal opportunity to earn a living and access services, and can participate fully in society and public life. The enforcement of non-discrimination laws, such as the Colorado Anti-Discrimination Act at issue here, is crucial to achieving this goal.

Although, as explained in Part II, Petitioners' challenge does not implicate heightened scrutiny under the compelled-speech doctrine or the right to free exercise of religion, local governments' interest in preventing discrimination is sufficient to satisfy any form of judicial scrutiny. This Court has long recognized that governments have an interest "of the highest order" in eliminating discrimination by, for example, "assuring its citizens equal access to publicly available goods and services." *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). And the Court has repeatedly upheld non-discrimination

laws over claims that they infringe on individual rights of expression or association. *Id.*; *see also Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). Indeed, the Court rejected "the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction," because "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014).

The interest in eradicating discrimination is no less compelling as to laws explicitly prohibiting discrimination based on sexual orientation – a trait this Court has recognized as both "immutable" and "a normal expression of human sexuality." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015). Courts from Washington State to Washington, D.C. have confirmed this point.[3] To further this interest, local governments have enacted a range of laws and policies aimed at

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[3] *See Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017) (upholding state non-discrimination law over challenge by flower shop seeking not to provide arrangement for same-sex wedding); *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 38 (D.C. 1987) (enforcing the District of Columbia's non-discrimination law with respect to recognizing gay-rights university student groups); *In re Gifford v. McCarthy*, 137 A.D.3d 30, 40 (N.Y. App. Div. 2016) (confirming application of state non-discrimination law to wedding venue's refusal to serve a same-sex couple based on religious beliefs).

preventing the serious harms that discrimination inflicts on LGBTQ people and on our communities.

A. Discrimination Against LGBTQ People Imposes Significant Harms.

The strength of local governments' interest in preventing discrimination against LGBTQ people reflects the profound and stigmatizing effects of that discrimination. When individuals are denied equal access to public goods and public establishments, they experience "a deprivation of personal dignity" that has lasting effects. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964). Exclusion humiliates and demeans them in the very manner prohibited by our Nation's "basic charter." *Obergefell*, 135 S. Ct. at 2601-02. This mistreatment has concrete and wide-ranging effects on the health and well-being of the individuals who experience it, which burdens Amici and our communities.

A wealth of social-science research demonstrates the extent and impact of discrimination against LGBTQ people in employment, housing, health care, and public accommodations, to the significant detriment of LGBTQ people and their communities.[4] Almost half of LGBT

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[4] Courts, legislatures, and administrative agencies have also described continuing patterns of discrimination against LGBT people. *See* Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy. L.A. L. Rev. 715, 728-34 (2012) (summarizing findings). Here and elsewhere, this brief

people in a 2014 survey reported discrimination in the workplace and significant percentages reported discrimination in housing and education and while trying to access public accommodations.[5] A 2017 survey found that 25 percent of LGBT respondents had experienced discrimination because of their sexual orientation or gender identity in the previous year alone.[6]

This discrimination causes tangible harms. It undermines LGBTQ people's economic stability.[7] LGBTQ people also face particular burdens when trying to

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uses "LGBT" when referring to social-science research that uses that term. Otherwise, the brief uses "LGBTQ."

[5] Human Rights Campaign, *Beyond Marriage Equality: A Blueprint for Federal Non-Discrimination Protections* 7 (2014), *archived at* https://perma.cc/3ZKS-B87L.

[6] Sejal Singh & Laura E. Durso, Ctr. for Am. Progress, *Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways* (May 2, 2017), *archived at* https://perma.cc/MWS2-GC8J. Studies involving testing corroborate the high rates of self-reported experiences of discrimination. For example, a study by the U.S. Department of Housing and Urban Development concluded that same-sex couples were treated less favorably in the online rental housing market than different-sex couples in all fifty of the metropolitan areas tested. U.S. Dep't of Housing & Urban Dev., *An Estimate of Housing Discrimination Against Same-Sex Couples* vi (2013), *archived at* https://perma.cc/H6L4-9NX2. In addition, among LGBTQ people, transgender people experience particularly high rates of discrimination. S.E. James et al., Nat'l Ctr. for Transgender Equality, *Report of the 2015 U.S. Transgender Survey* 97, 150 (2016), *archived at* https://perma.cc/27HW-4B3R.

[7] Christy Mallory et al., Williams Inst., *The Impact of Stigma and Discrimination Against LGBT People in Texas* 57 (2017), *archived at* https://perma.cc/9ULV-BEZX [hereinafter *Impact of Stigma*].

access health care. A 2010 study found that 70 percent of transgender respondents and nearly 56 percent of lesbian, gay, or bisexual respondents experienced discrimination when seeking health services – sometimes being refused care altogether or suffering verbal and physical abuse from healthcare professionals.[8] This discrimination is linked to increased health risks and health disparities.[9] And LGBTQ people who face discrimination based on other aspects of their identities – for example, LGBTQ people of color and LGBTQ people with disabilities – experience the compounding effects of multiple forms of discrimination.[10]

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[8] Lambda Legal, *When Health Care Isn't Caring: Lambda Legal's Survey on Discrimination Against LGBT People and People Living with HIV* 5 (2010), *archived at* https://perma.cc/3U3Y-6GPX.

[9] U.S. Dep't of Health & Human Servs., Healthy People 2020, *Lesbian, Gay, Bisexual, and Transgender Health* (last visited Sept. 21, 2017), *archived at* https://perma.cc/3WH4-96KU; *see, e.g.*, Inst. of Med. of the Nat'l Acads., *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* 14 (2011), *archived at* https://perma.cc/V2XY-E6M5 ("Although LGBT people share with the rest of society the full range of health risks, they also face a profound and poorly understood set of additional health risks due largely to social stigma."); Am. Psych. Assoc., *Stress in America: The Impact of Discrimination* 8, 11, 22 (2016), *archived at* https://perma.cc/TY43-5JLA (concluding that experiencing discrimination is associated with higher stress and poorer health for LGBT people).

[10] *See, e.g.*, Mallory et al., *Impact of Stigma*, *supra*, at 38 (noting that "[a] growing body of research supports that for many LGBT people who face discrimination along multiple axes of inequality, the resulting impact is greater than the sum of the parts" (citing studies)).

Local governments, which provide a variety of services directly to residents, incur significant costs when they act to ameliorate the harms of discrimination. When LGBT people experience the negative effects of discriminatory treatment, they "are more likely to rely on government benefits and services."[11] Local governments provide many of the essential services that LGBTQ people turn to in these circumstances, such as transitional housing, shelters, and social services for people experiencing homelessness.[12] Local governments thus absorb much of the costs resulting from discrimination against LGBTQ people.

Discrimination against LGBTQ people also affects local governments as employers and the broader local economic climate. Workplace discrimination "introduc[es] inefficiencies and costs that cut into profits and undermine businesses' bottom line," and each year, approximately two million American workers leave their

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[11] *Id.* at 57.

[12] A 2017 Williams Institute study found that approximately 177 individuals in Texas had to stay at a shelter because of discrimination in the past year due to housing discrimination on the basis of gender identity, and estimated that "this form of housing discrimination may cost Texas up to $372,000 annually in shelter expenditures." *Id.* at 64. The study also found that 602 transgender Texans enrolled in Medicaid because they lost a job due to gender identity discrimination, which cost the State $1,253,000 annually in Medicaid expenditures. *Id.* at 63-64. As the study noted, "[t]hese particular costs represent only two of a variety of costs that can accrue to the state and localities when LGBT individuals face discrimination." *Id.* at 64.

jobs due to discrimination at an estimated cost to businesses of $64 billion.[13]

In addition, the character and culture of Amici's communities are harmed when people in their jurisdictions are turned away from businesses and other places of public accommodation due to discrimination. When LGBTQ people avoid certain stores or restaurants because they fear discrimination, their participation in public life diminishes.[14] Exclusion from public places and public establishments not only demeans individuals, but damages the community's social climate. Without the enforcement of legal protections, incidents of discrimination foster an environment in which not all are welcome or are entitled to equal treatment in Amici's jurisdictions, harming our communities as a whole.

Non-discrimination protections improve the welfare of our LGBTQ residents and encourage inclusiveness and social cohesion, resulting in healthier and

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[13] Crosby Burns, Ctr. for Am. Progress, *The Costly Business of Discrimination: The Economic Costs of Discrimination and the Financial Benefits of Gay and Transgender Equality in the Workplace* 1 (2012), *archived at* https://perma.cc/T8VE-WNWY.

[14] The 2015 U.S. Transgender Survey reported that one in five respondents avoided at least one type of public accommodation in the past year because they feared being mistreated. James et al., *supra*, at 14. The Center for American Progress reported that concern for discrimination led 26.7 percent of transgender respondents to make specific decisions about where to shop, 25.7 percent to avoid public places such as stores and restaurants, 11.9 percent to forego services their family needed, and 10.9 percent to avoid public transportation. Singh & Durso, *supra*.

more stable communities. Research shows that States that have enacted laws prohibiting discrimination based on sexual orientation and gender identity have fewer disparities between LGBT and non-LGBT people across a range of economic, family, and health indicators.[15] For example, studies have shown that non-discrimination laws correlate with increased annual earnings for gay and lesbian people and help to reduce the wage gap that exists between gay men and heterosexual men.[16]

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[15] Amira Hasenbush et al., Williams Inst., *The LGBT Divide: A Data Portrait of LGBT People in the Midwestern, Mountain & Southern States* 1-2 (2014), *archived at* https://perma.cc/8846-BHMB.

[16] Mallory et al., *Impact of Stigma*, *supra*, at 37-39 (citing studies). In addition to improving the health and welfare of LGBTQ residents, non-discrimination ordinances may also benefit localities financially. For example, after the City and County of San Francisco required city contractors to extend spousal health benefits to their employees' domestic partners, more than 66,000 people received health benefits in the first seven years of implementation. City & Cty. of S.F. Hum. Rights Comm'n, *Seven Year Update on the San Francisco Equal Benefits Ordinance* 4 (2004), *archived at* https://perma.cc/9XAY-WC5H. San Francisco likely saved a minimum of $10 million in the first five years of the ordinance's enactment as a result of the increase in insured residents. Pizer et al., *supra*, at 775-76 (citing Marc A. Rogers & Daley Dunham, Inst. of Gay & Lesbian Strategic Studies, *Contracts with Equality: An Evaluation of the San Francisco Equal Benefits Ordinance* 29 (2003)).

B. To Further Their Interest in Protecting Against Discrimination, Cities and Counties Across the Country Have Enacted a Range of Local Laws and Policies to Ensure Equal Treatment of LGBTQ People.

Demonstrating their strong commitment to ensuring equal treatment of LGBTQ people, local jurisdictions throughout the United States have adopted laws and policies to prohibit discrimination on the basis of sexual orientation or gender identity and to promote LGBTQ inclusivity. These laws and policies have steadily expanded across the country[17] and extend to virtually all areas of public life – public accommodations, employment, housing, government contracting and procurement, credit and lending, health, and education, among others. They are features of localities large and small, from major population centers such as Austin, Los Angeles, Chicago, and New York City, to smaller cities and towns such as Iowa City, Iowa, Whitefish, Montana,[18] and Lakewood, Colorado, where Masterpiece Cakeshop is located.[19]

In many jurisdictions, these protections operate in conjunction with state laws that expressly prohibit

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[17] Human Rights Campaign, *Municipal Equality Index: A Nationwide Evaluation of Municipal Law* 12-14 (2017), *archived at* https://perma.cc/5Y2N-TR2V [hereinafter *Municipal Equality Index*].

[18] *See* Human Rights Campaign, *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity* (Jan. 28, 2017), *archived at* https://perma.cc/4CJT-FY7L.

[19] Lakewood, Colo., Code of Ordinances §§ 4.14.010, 4.15.010 (2014).

discrimination on the basis of sexual orientation and gender identity, and in some instances local legislation has led the way in enacting protections that the State later adopted as well. For example, the County of Santa Clara has added to California's extensive statewide LGBTQ protections with a range of policies, among them prohibiting discrimination on the basis of sexual orientation or gender identity in county employment, programs, services, and contracting,[20] and maintaining an Office of LGBTQ Affairs to address gaps in services to LGBTQ residents and promote equal treatment of LGBTQ people.[21] The City of Los Angeles, too, prohibits discrimination on the basis of sexual orientation and gender identity in municipal employment and other public positions[22] and requires city contractors to maintain policies prohibiting sexual-orientation discrimination and to provide benefits to their employees without regard to sexual orientation.[23] New York City's

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[20] Cty. of Santa Clara, Bd. of Supervisors Res. 03-06 (Aug. 5, 2003), *archived at* https://perma.cc/P388-L3QB; *see* Cty. of Santa Clara, Santa Clara County Board of Supervisors Policy Manual 5.5.5.4 (2017), *archived at* https://perma.cc/Y9JP-T2WQ (setting forth contracting policy incorporating California non-discrimination law).

[21] Cty. of Santa Clara, Office of Pub. Aff., *County of Santa Clara First County in the Nation to Open Office of LGBTQ Affairs* (Jan. 7, 2016), *archived at* https://perma.cc/2HXL-HXAQ.

[22] L.A., Cal., City Charter §§ 104(i), 501(e) (2015); L.A., Cal., Administrative Code §§ 4.400, 4.820(a) (2017); L.A., Cal., Exec. Directive No. 12, Policy against Discrimination in Employment based on Sexual Orientation, Gender Identity or Gender Expression (June 12, 2008), *archived at* https://perma.cc/A8BK-2PRR.

[23] L.A., Cal., Administrative Code §§ 4.404.1, 4.404.2, 4.860, 10.8.2 *et seq.*

Human Rights Law has prohibited discrimination on the basis of sexual orientation in public and private employment, housing, and public accommodations since 1986 – sixteen years before the State passed similar protections[24] – and has prohibited discrimination on the basis of gender identity since 2002.[25]

Many localities in States without laws explicitly barring sexual-orientation or gender-identity discrimination have demonstrated similar support for ensuring equal treatment of LGBTQ people, enacting local ordinances and policies that fill critical gaps in statewide protections. As of March 2017, more than 220 such cities and counties had adopted their own nondiscrimination protections.[26] For example, while Texas law does not explicitly prohibit sexual-orientation and gender-identity discrimination, many major cities within the State have enacted their own laws providing these protections. A dozen Texas jurisdictions with more than 100,000 residents have local laws or policies providing explicit protections on the basis of sexual orientation or gender identity.[27]

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[24] 2002 N.Y. Laws, ch. 2, A1971; N.Y.C., N.Y., Local Law No. 2 (1986).

[25] N.Y.C., N.Y., Local Law No. 3 (2002).

[26] Laura E. Durso et al., Ctr. for Am. Progress, *Advancing LGBTQ Equality Through Local Executive Action* ¶ 60 (Aug. 25, 2017), *archived at* https://perma.cc/RM5D-A2BB; *see also Municipal Equality Index* 14 (noting that twenty-four million Americans live in municipalities with more robust gender-identity protections than under state law).

[27] Mallory et al., *Impact of Stigma*, *supra*, at 14; *see, e.g.*, Austin, Tex., Code of Ordinances §§ 5-1-1, 5-1-2, 5-2-1, 5-3-1, 5-4-1

These types of protections are not limited to large urban centers or jurisdictions in States that have explicit prohibitions against sexual-orientation or gender-identity discrimination. For example, in December 2016, the City of Wheeling, West Virginia, passed an ordinance barring discrimination on the basis of sexual orientation and gender identity in public and private employment, public accommodations, and housing, making it one of ten local jurisdictions in the State to do so.[28] The 20,000-person City of Danville, Kentucky enacted a similar non-discrimination ordinance, joining six other Kentucky jurisdictions that had passed ordinances within a two-year period explicitly protecting against discrimination on the basis of sexual orientation or gender identity, including the 334-person town of Vicco.[29]

(2017); Dallas, Tex., Code of Ordinances §§ 46-6, 46-6.1, 46-7 (2017); El Paso, Tex., Code of Ordinances § 6.1-11 (2017); Fort Worth, Tex., Code of Ordinances §§ 17-48, 17-67, 17-86, 17-88 (2017); Houston, Tex., Code of Ordinances §§ 2-451, 2-452, 2-454 (2017); Plano, Tex., Code of Ordinances § 2-11 (2017); San Antonio, Tex., Code of Ordinances §§ 2-554, 2-592, 2-621 (2017).

[28] Wheeling, W. Va., Codified Ordinances §§ 169.01-169.10 (2017); *see* Letitia Stein, *In conservative America, small cities stand up for LGBT rights*, Reuters (Mar. 15, 2017), *archived at* https://perma.cc/F4X4-97A7.

[29] Covington, Ky., Code of Ordinances § 37.01 *et seq.* (2017); Danville, Ky., Code §§ 5-5.1–5-5.12 (2017); Frankfort, Ky., Code of Ordinances § 96.01 *et seq.* (2014); Lexington-Fayette Cty., Ky., Code of Ordinances § 2-33 (2017); Louisville-Jefferson Cty., Ky., Metro Code § 92.01 *et seq.* (2017); Morehead, Ky., Code of Ordinances § 96.01 *et seq.* (2017); Perry Cty., Ky., *City of Vicco Officials* (last visited Sept. 22, 2017), *archived at* https://perma.cc/KS7L-46MG; *see* Christy Mallory & Brad Sears, Williams Inst., *Employment*

Some of these localities maintain LGBTQ protections in public employment despite state laws barring cities and counties from adopting ordinances prohibiting discrimination by private actors on any basis not explicitly included in the state non-discrimination law (such as sexual orientation or gender identity). After Tennessee enacted such a restriction,[30] the City of Millington issued a statement of non-discrimination, banning discrimination on the basis of gender identity and sexual orientation with respect to all city programs, services, and activities.[31] Similarly, the cities of Chattanooga, Knoxville, and Memphis, as well as Knox County, have prohibited discrimination on the basis of sexual orientation and gender identity in their employment practices.[32]

Discrimination Based on Sexual Orientation and Gender Identity in Kentucky 5 (2015), *archived at* https://perma.cc/2CHB-EVWC; Tony Merevick, *Cities, Small Towns Across America Attempt To Fill Gaps In LGBT Rights*, BuzzFeed (Aug. 18, 2014), *archived at* https://perma.cc/Q5K4-MDYP.

[30] H.B. 600, 107th Gen. Assemb. (Tenn. 2011) (codified at Tenn. Code Ann. § 7-51-1802 (2017)).

[31] Millington, Tenn., *ADA/Non-Discrimination* (last visited Sept. 22, 2017), *archived at* https://perma.cc/BY2P-STSY.

[32] Knox Cty., Tenn., Code of Ordinances § 2-760 (2017); Knoxville, Tenn., Code of Ordinances § 15-57 (2017); Memphis, Tenn., Code of Ordinances § 3-8-6 (2017); Christy Mallory & Brad Sears, Williams Inst., *Employment Discrimination Based on Sexual Orientation and Gender Identity in Tennessee* 6 (2017), *archived at* https://perma.cc/3UTS-EVE8.

II. RECOGNIZING AN EXEMPTION FROM NON-DISCRIMINATION LAWS ON SPEECH OR RELIGION GROUNDS WOULD HARM AMICI AND THEIR COMMUNITIES.

Petitioners' position strikes at the core of Amici's non-discrimination protections and threatens the very harms those laws were enacted to prevent. Petitioners seek an exemption based on the First Amendment from a non-discrimination law requiring public accommodations to serve all customers, so as to enable them to exclude same-sex couples from the goods and services they offer to the public. That exemption would be unprecedented under the Free Speech and Free Exercise Clauses, and would fundamentally undermine Amici's ability to enforce laws evenhandedly to prevent discrimination against LGBTQ residents and other groups. The recognition of such an exemption would do no less than constitutionalize second-class status for certain members of our communities.

A. The First Amendment Does Not Entitle Petitioners to an Exemption From Generally Applicable Non-Discrimination Laws.

This Court has repeatedly declined to recognize an exemption on free-speech and free-exercise grounds from generally applicable laws, including laws requiring equal treatment in places of public accommodation. *See Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 888-89 (1990) (noting that there is no "private right to ignore generally applicable laws" under the Free Exercise Clause); *Hishon v. King & Spalding*, 467

U.S. 69, 78 (1984) (reaffirming that invidious private discrimination "has never been accorded affirmative constitutional protections"); *see also Roberts*, 468 U.S. at 634 (O'Connor, J., concurring) ("A shopkeeper has no constitutional right to deal only with persons of one sex."). When reviewing such challenges, the Court has distinguished between laws compelling speech or mandating religious orthodoxy and laws regulating conduct that incidentally implicate an individual's expression or religious beliefs. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47, 62 (2006); *Roberts*, 468 U.S. at 623-24; *United States v. Lee*, 455 U.S. 252, 260-61 (1982). Colorado's requirement that commercial businesses serve same-sex couples as they would different-sex couples is a permissible regulation of conduct under this precedent.

The First Amendment's prohibition of compelled speech guarantees that a State "may not compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995). Regulated parties in many instances may feel that complying with a law regulating conduct could be taken as expressing a position. But the prohibition on compelled speech is not implicated when a law regulates conduct that is not "inherently expressive," and a reasonable observer would "appreciate the difference" between a party's compliance with the law and the party's expression of a message. *FAIR*, 547 U.S. at 65. That the party may feel it necessary to express disagreement with the

required conduct is likewise not compelled speech under the First Amendment. *See id.*

Unlike the sorts of organizations that the Court has granted First Amendment protection from compelled speech or association – a not-for-profit youth-membership organization or a private parade, *see Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000); *Hurley*, 515 U.S. at 579-81 – commercial proprietors do not communicate endorsement of their customers' activities when they provide goods and services to members of the public. Indeed, businesses that hold themselves out to the public have long been required to provide service to any customers who conducted themselves properly. *See Hurley*, 515 U.S. at 571 (explaining that, at common law, "the rule was that the innkeeper is not to select his guests; he has no right to say to one, you shall come into my inn, and to another you shall not" (internal quotation marks and brackets omitted)). No reasonable observer would understand a public accommodation's equal treatment of all customers, in compliance with a non-discrimination law, as an endorsement of any particular customer's status or life choices. Thus, that conduct does not constitute protected expression under the First Amendment. *See FAIR*, 547 U.S. at 62.

Although a baker may employ creative talents in designing a wedding cake, a cake created by a business that holds itself out to the public is not the baker's speech. Petitioners argue that their wedding cakes convey the message that the wedding "should be celebrated," Pet'rs' Br. 19, but no reasonable observer

would think that this celebratory message was Petitioners', rather than that of the wedding couple and their loved ones. Indeed, Petitioners do not contend that they provided wedding cakes only to customers whose unions they deemed particularly worthy of celebration. Rather, they held themselves out to the public and accepted all customers – except same-sex couples seeking wedding cakes. Thus, there is no plausible basis to conclude here that Petitioners would have expressed any message of their own by selling a wedding cake to Respondents Charlie Craig and David Mullins.

Nor does a non-discrimination law requiring public accommodations to afford same-sex customers access to goods and services on equal terms offend the Free Exercise Clause. That clause provides no "private right to ignore generally applicable laws." *Smith*, 494 U.S. at 886. When such a law mandates conduct that conflicts with an individual's religious beliefs, "the right of free exercise does not relieve an individual of the obligation to comply." *Id.* at 879. This principle ensures the fair administration of laws in a pluralistic society. If an individual's obligation to obey the law were "contingent upon the law's coincidence with his religious beliefs," each person would be "a law unto himself." *Id.* at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

As this Court has recognized, there is no way to limit exemptions from generally applicable laws based on religious belief without entangling courts and local administrative agencies in the "unacceptable business

of evaluating the relative merits of differing religious claims." *Id.* at 887 (internal quotation marks omitted). Without prioritizing some religious beliefs and practices over others, government officials would have to afford an exemption to any person who, like the business owner in this case, asserts a religious objection to serving same-sex couples. No non-discrimination scheme can effectively prevent discrimination if it is subject to exceptions based on unreviewable claims of religious belief. The Court has rightly rejected that untenable result.

B. Petitioners' Proposed Exemption Would Undermine Local Governments' Ability to Protect Their Residents From Discrimination and Other Harms.

Allowing public accommodations to opt out of serving LGBTQ customers on free-speech or free-exercise grounds would undermine the enforcement of local non-discrimination laws, requiring courts and enforcement agencies to accept an unknown and ever-changing number of individualized exemptions from the laws' protections. A non-discrimination scheme designed to ensure equal treatment regardless of protected status could not effectively be administered in the face of such exceptions. The implications of this proposed rule extend beyond same-sex marriage, and could undermine decades of progress on inclusion and equality for LGBTQ people and all minority and historically disfavored groups – enshrining discrimination as a constitutional norm.

1. The Proposed Exemption Would Undermine Effective Enforcement of Non-Discrimination Protections.

A system of exemptions based on individuals' subjective view of the expressive content of their conduct has no limiting principle and would undermine the effective enforcement of non-discrimination laws. This Court has repeatedly underscored the basic unworkability of a system of laws that contains this unbounded potential for individualized exemptions. *See Smith*, 494 U.S. at 888 (rejecting an exemption under the Free Exercise Clause that would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind"); *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

Petitioners would confine their free-speech exemption to highly customized products like their cakes, to the exclusion of the wide variety of less personalized goods and services involved in wedding ceremonies. *See* Pet'rs' Br. 9. But this distinction is unlikely to hold in practice, and Petitioners' own arguments blur the boundary that they propose. Petitioners' objection to serving Mr. Craig and Mr. Mullins relies on their view that providing a cake is an endorsement of the wedding. The objection is thus premised on the transaction itself, not the cake's design. On this theory, numerous businesses in the wedding industry and beyond that

provide creative or personalized goods and services might wish to claim that transacting business with a same-sex couple would convey an unwanted expression of support for the union – for example, a hall owner who decorates the space to celebrate the occasion, a florist who selects and arranges flowers based on the couple's preferences, a restaurateur who designs and cooks a meal for the couple's anniversary, or a stationery store that designs and sells wedding invitations.

Granting businesses an exemption from a requirement to treat customers equally based on a business owner's asserted belief about what a transaction may symbolize risks sweeping a broad category of commercial conduct into the First Amendment's purview. If a subjective belief of compelled expression were enough to claim an exemption, courts and local authorities tasked with enforcing non-discrimination statutes would have to choose between accepting such claims uncritically, opening the door wide to such relief, or attempting to evaluate the sincerity and plausibility of the assertions. Interpreting the Free Speech Clause to require this unenviable choice would expand its protections past any reasonable limit.[33]

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[33] Petitioners' proposed limiting principle is also internally inconsistent. They claim to be engaged in protected expression because providing a cake for a customer's wedding in and of itself symbolizes participation in the wedding, notwithstanding any particular design or creative element created for the cake. If, however, as Petitioners contend, the presence of one of their cakes at a wedding would be understood as their expression of support for the union, Pet'rs' Br. 23-24, then it would seem to matter little

Similar problems would attend an exemption made under the Free Exercise Clause. As this case confirms, religious conviction may be expressed in many ways, and objections could be sought from any number of commonplace commercial transactions. A baker who refuses to serve a same-sex couple could refuse to provide a birthday cake to the child of an interracial or unmarried couple because providing the cake would express endorsement of a family structure that conflicts with his religious convictions. A hotelier could object to providing an event space to a customer with a different faith because the event would celebrate a religious practice to which the hotelier objects. A landlord could refuse to rent to an unmarried couple because the transaction would express support for conduct which the landlord believes to be wrong. *Cf. Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 276 (Alaska 1994) (enforcing state and local nondiscrimination laws against landlord who refused to rent to an unmarried couple on the basis of religious beliefs). Because courts and local administrative authorities cannot permissibly evaluate "the relative merits" of the religious beliefs of the members of their diverse communities, *Smith*, 494 U.S. at 887, no limiting principle could prevent religious objections such as these from swallowing the rule. This Court has recognized the danger that such a regime would entail and

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whether Petitioners designed the cake with a particular couple in mind or allowed the couple to purchase the cake already made. A proprietor of readymade goods could invoke the same reasoning to avoid having to transact business with a same-sex couple.

declined to sanction free-exercise objections on this basis. *Id.* at 888-89.

A diverse community of individuals holding divergent views and adhering to different faiths could not remain inclusive if these free-speech and free-exercise objections were allowed to override a generally applicable non-discrimination scheme. Individuals are free to limit with whom they associate when conducting their private affairs. But the public and private spheres impose different demands. When commercial entities solicit business from all comers, they may be required by legislation not to exclude customers on the basis of their race, gender, religion, sexual orientation, or other status. Permitting businesses in the public sphere to avoid serving certain customers because of their identity or protected status would undermine the purpose and effect of non-discrimination protections.

2. The Proposed Exemption Threatens the Fabric of Amici's Inclusive Communities.

An open-ended regime of free-speech or free-exercise exemptions from non-discrimination laws would provide official sanction for business owners to refuse to serve members of our communities because of their status. Those exemptions would undermine a core purpose of non-discrimination laws: to ensure the equal dignity of all people, regardless of their race, gender, religion, sexual orientation, or any other protected status. It also threatens Amici's ability to foster

inclusivity in order to maintain the essential character of their communities. Amici are well acquainted with the fraying of our social fabric that results when members of our community cannot fully participate in commercial and civic life.

It is no answer to say that the First Amendment will not always justify an exemption from compliance with non-discrimination laws because the Constitution recognizes a compelling interest in eradicating discrimination on the basis of some protected categories, such as race. *See* Br. for the United States as Amicus Curiae 32. Amici have enacted non-discrimination laws and policies precisely because their experience has confirmed that the discrimination that harms their communities and their residents takes many forms, not all of which have yet been recognized as subject to heightened scrutiny under the Constitution, such as disability and age. That reasoned determination, shared by jurisdictions across the nation, should be respected, not undermined by free-standing exemptions.

Indeed, creating a constitutional hierarchy of non-discrimination protections would worsen the corrosive impact of the proposed exemption. Laws prohibiting discrimination in public accommodations are rooted in preventing the "humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because" of his identity. *Heart of Atlanta Motel*, 379 U.S. at 292 (Goldberg, J., concurring) (quoting S. Rep. No. 88-872, at 16 (1964)). Governmental recognition of

the harms caused by exclusion for some members of our communities, but not for others, would reinforce the stigma and injury for the latter group. *Cf. Roberts*, 468 U.S. at 625 ("[S]tigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race."). Singling out individuals from the "protections taken for granted by most people" demeans their experience of discrimination as less worthy of protection than that of others. *Romer v. Evans*, 517 U.S. 620, 631 (1996). And rooting that exclusion in the Constitution itself contradicts the very purpose of non-discrimination protection.

"Precisely because we are a cosmopolitan nation" composed of people of every conceivable faith, background, and creed, a baseline of respect and tolerance is necessary for our society to function. *Smith*, 494 U.S. at 888 (internal quotation marks omitted). We need not all agree with one another or believe the same things. Indeed, many of Amici's non-discrimination laws and policies expressly prohibit discrimination on the basis of religion in order to ensure that persons of all faiths may feel welcome in our communities. This commitment to inclusion requires all persons in our communities, whatever their personal beliefs, to adhere to laws requiring equal treatment of others in the public sphere, so that the members of our communities may engage in commercial transactions freely and on equal terms, without fear of discrimination. Granting Petitioners an exemption from Colorado's non-discrimination statute

would enshrine unequal treatment in the Constitution. The First Amendment does not require that result.

CONCLUSION

Amici urge this Court to hold that the Colorado Anti-Discrimination Act may, consistent with the First Amendment, bar Masterpiece Cakeshop and its owner Jack Phillips from engaging in status-based discrimination by refusing to serve a same-sex couple.

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October 30, 2017

Counsel for Amici Curiae

APPENDIX

LIST OF AMICI

City and County of Denver, Colorado
City and County of Honolulu, Hawai'i
City and County of San Francisco, California
City of Alameda, California
City of Alexandria, Virginia
City of Allentown, Pennsylvania
City of Atlanta, Georgia
City of Austin, Texas
City of Baltimore, Maryland
City of Bangor, Maine
City of Berkeley, California
City of Boston, Massachusetts
City of Boulder, Colorado
City of Buffalo, New York
City of Burlington, Vermont
City of Chicago, Illinois
City of Cincinnati, Ohio
City of Cleveland Heights, Ohio
City of Dayton, Ohio
City of Eugene, Oregon
City of Evanston, Illinois
City of Hallandale Beach, Florida
City of Iowa City, Iowa
City of Kansas City, Missouri
City of Lansing, Michigan
City of Long Beach, California
City of Los Angeles, California
City of Madison, Wisconsin
City of Minneapolis, Minnesota
City of Mountain View, California
City of New Rochelle, New York
City of New York, New York

City of Northampton, Massachusetts
City of Oakland, California
City of Olympia, Washington
City of Palm Springs, California
City of Philadelphia, Pennsylvania
City of Phoenix, Arizona
City of Pittsburgh, Pennsylvania
City of Portland, Maine
City of Providence, Rhode Island
City of Rochester, New York
City of Sacramento, California
City of Saint Paul, Minnesota
City of San Diego, California
City of Santa Monica, California
City of Seattle, Washington
City of Shoreline, Washington
City of Stamford, Connecticut
City of St. Louis, Missouri
City of Syracuse, New York
City of Tempe, Arizona
City of Traverse City, Michigan
City of Tucson, Arizona
City of West Hollywood, California
City of West Palm Beach, Florida
City of Whitefish, Montana
Cook County, Illinois
County of Los Angeles, California
County of Marin, California
County of San Mateo, California
County of Santa Clara, California
County of Santa Cruz, California
King County, Washington
Montgomery County, Maryland
Salt Lake City, Utah
Town of Brighton, New York

Town of Carrboro, North Carolina
Town of Chapel Hill, North Carolina
Township of Maplewood, New Jersey

Mayor Steve Adler, City of Austin, Texas
Mayor Jesse Arreguin, City of Berkeley, California
Mayor Joseph M. Baldacci, City of Bangor, Maine
Mayor Tom Barrett, City of Milwaukee, Wisconsin
Mayor Virgil Bernero, City of Lansing, Michigan
Mayor David Bieter, City of Boise, Idaho
Mayor Jacqueline M. Biskupski, Salt Lake City, Utah
Mayor Bill de Blasio, City of New York, New York
Mayor Muriel Bowser, Washington, District of Columbia
Mayor Noam Bramson, City of New Rochelle, New York
Mayor Byron W. Brown, City of Buffalo, New York
Mayor Kirk W. Caldwell, City and County of Honolulu, Hawai'i
Mayor Jim Carruthers, City of Traverse City, Michigan
Mayor Christopher B. Coleman, City of Saint Paul, Minnesota
Mayor Joy Cooper, City of Hallandale Beach, Florida
Mayor David Coulter, City of Ferndale, Michigan
Mayor Victor De Luca, Township of Maplewood, New Jersey
Mayor John Dennis, City of West Lafayette, Indiana
Mayor Amanda Edmonds, City of Ypsilanti, Michigan
Mayor Jorge Elorza, City of Providence, Rhode Island
Mayor Rahm Emanuel, City of Chicago, Illinois
Mayor Eric Garcetti, City of Los Angeles, California
Mayor Robert Garcia, City of Long Beach, California
Mayor Stephen H. Hagerty, City of Evanston, Illinois
Mayor Michael B. Hancock, City and County of Denver, Colorado
Mayor Pam Hemminger, Town of Chapel Hill, North Carolina
Mayor Jess Herbst, Town of New Hope, Texas

Mayor Betsy Hodges, City of Minneapolis, Minnesota
Mayor Bobby J. Hopewell, City of Kalamazoo, Michigan
Mayor Sylvester "Sly" James, City of
Kansas City, Missouri
Mayor Suzanne Jones, City of Boulder, Colorado
Mayor Lioneld Jordan, City of Fayetteville, Arkansas
Mayor Jeff Katz, Village of Cooperstown, New York
Mayor Emily Larson, City of Duluth, Minnesota
Mayor Lydia Lavelle, Town of Carrboro, North Carolina
Mayor Connie Leon-Kreps, City of
North Bay Village, Florida
Mayor Eric Mamula, Town of Breckenridge, Colorado
Mayor John Manchester, City of Lewisburg, West Virginia
Mayor Esther Manheimer, City of
Asheville, North Carolina
Mayor David Martin, City of Stamford, Connecticut
Mayor John McNally, City of Youngstown, Ohio
Mayor Mark S. Meadows, City of East Lansing, Michigan
Mayor Kurt Metzger, City of Pleasant Ridge, Michigan
Mayor Stephanie A. Miner, City of Syracuse, New York
Mayor Mark Mitchell, City of Tempe, Arizona
Mayor John Muhlfeld, City of Whitefish, Montana
Mayor Pete Muldoon, Town of Jackson, Wyoming
Mayor Jeri Muoio, City of West Palm Beach, Florida
Mayor David Narkewicz, City of
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Mayor Kathleen Newsham, City of Bay City, Michigan
Mayor Ron Nirenberg, City of San Antonio, Texas
Mayor Ed Pawlowski, City of Allentown, Pennsylvania
Mayor William Peduto, City of Pittsburgh, Pennsylvania
Mayor Joseph Petty, City of Worcester, Massachusetts
Mayor Kasim Reed, City of Atlanta, Georgia
Mayor Gary Resnick, City of Wilton Manors, Florida
Mayor Christopher Roberts, City of Shoreline, Washington

Mayor Jennifer Roberts, City of
Charlotte, North Carolina
Mayor Madeline Rogero, City of Knoxville, Tennessee
Mayor Ken Rosenberg, City of Mountain View, California
Mayor Jonathan Rothschild, City of Tucson, Arizona
Mayor Libby Schaaf, City of Oakland, California
Mayor Cheryl Selby, City of Olympia, Washington
Mayor Allison Silberberg, City of Alexandria, Virginia
Mayor Marjorie Sloan, City of Golden, Colorado
Mayor Trish Herrera Spencer, City of Alameda, California
Mayor Cheryl Stephens, City of Cleveland Heights, Ohio
Mayor Marilyn Strickland, City of Tacoma, Washington
Mayor Ron Strouse, Borough of Doylestown, Pennsylvania
Mayor Christopher Taylor, City of Ann Arbor, Michigan
Mayor Ted Terry, City of Clarkston, Georgia
Mayor James A. Throgmorton, City of Iowa City, Iowa
Mayor Martin J. Walsh, City of Boston, Massachusetts
Mayor Lovely Warren, City of Rochester, New York
Mayor Miro Weinberger, City of Burlington, Vermont
Mayor Eileen Weir, City of Independence, Missouri
Mayor Nan Whaley, City of Dayton, Ohio
Mayor Ted Winterer, City of Santa Monica, California
Mayor Patrick L. Wojahn, City of College Park, Maryland
Town Supervisor William W. Moehle,
Town of Brighton, New York

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